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# Presidential Control of Adjudication Within the Executive Branch

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# PRESIDENTIAL CONTROL OF ADJUDICATION WITHIN THE EXECUTIVE BRANCH

*Harold J. Krent*<sup>†</sup>

## ABSTRACT

Commentators long have debated the scope of the Chief Executive's role in overseeing, enforcing, and at times reshaping the many programs and policies enacted by Congress. The question of the President's authority over adjudications that Congress has entrusted to administrative agencies has been examined less frequently. The tension is clear: on the one hand, the President should have inherent authority to manage the adjudications that Congress has seen fit to entrust to agencies to resolve; but on the other, political control over adjudication seems anathema to rights of litigants asserting claims against the government itself. Congress, therefore, may seek to curtail the executive branch's control of the adjudicative process to provide greater rights for individuals and firms involved in adjudications within the executive branch.

Accordingly, this Article first examines the scope of the President's Article II authority to manage adjudications within the executive branch. The Article initially notes, as have others, that the Supreme Court has limited the President's removal and (to some extent) appointment authority over officials engaged in adjudication, as opposed to other functions within the executive branch. The Article then argues that Congress, accordingly, should also be able to delimit the President's general Article II managerial authority over adjudicative officials more than those exercising enforcement and regulatory functions. Finally, the Article considers congressional directives that curb executive management efforts, particularly the recent Veterans Access Act that altered the disciplinary appeal route for SES employees in the Veterans Administration and the congressional specification in the Administrative Procedure Act that Administrative Law Judges ("ALJs") enjoy decisional independence. The Article concludes that such congressional direction, if clear, should displace the executive interest, in the first example, of preserving the role of the Merit Systems Protection Board in overseeing all federal employee discipline cases and, in the second example, in removing from office ALJs whom the employing agency believes do not competently interpret the law, apply agency policy, or find facts.

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## CONTENTS

|   |      |
|---|------|
| INTRODUCTION.....   | 1084 |
| I. THE NATURE OF ADJUDICATION WITHIN THE EXECUTIVE BRANCH.....  | 1085 |
| II. A BRIEF HISTORY OF ADJUDICATION WITHIN THE EXECUTIVE<br>BRANCH .....  | 1089 |
| III. PRESIDENTIAL CONTROL THROUGH THE APPOINTMENT AND<br>REMOVAL AUTHORITIES .....                                      | 1091 |
| <i>A. The Appointment Power</i> .....   | 1092 |
| <i>B. The Removal Authority</i> .....   | 1094 |
| IV. MANAGERIAL AUTHORITY OVER ADJUDICATIVE OFFICIALS IN THE<br>EXECUTIVE BRANCH .....                                   | 1101 |
| <i>A. Presidential Managerial Controls</i> .....  | 1101 |
| <i>B. Accommodating Congressional Design of Administrative<br/>Adjudication with Executive Managerial Control</i> ..... | 1105 |
| 1. Veterans Access Act .....  | 1105 |
| 2. The APA .....  | 1108 |
| CONCLUSION.....   | 1117 |

## INTRODUCTION

Commentators long have debated the scope of the Chief Executive's role in overseeing, enforcing, and at times reshaping the many programs and policies enacted by Congress. The Supreme Court has weighed in on conflicts between Congress's Article I powers and the Chief Executive's Article II authority often, most recently curbing the President's Recess Appointment authority.<sup>1</sup>

The question of the President's authority over adjudications that Congress has entrusted to administrative agencies has been examined less frequently. The tension is clear: on the one hand, the President should have inherent authority to manage the adjudications that Congress has seen fit to entrust to agencies to resolve; but on the other, political control over adjudication seems anathema to rights of litigants asserting claims against the government itself. Congress, therefore, may seek to curtail the executive branch's control of the adjudicative process to provide rights for individuals and firms involved in adjudications within the executive branch.<sup>2</sup>

This Article first examines the scope of the President's Article II authority to manage adjudications within the executive branch. This Article initially notes, as have others, that the Supreme Court has limited the President's removal and (to some extent) appointment authority over officials engaged in adjudication as opposed to other functions within the executive branch. The Article then argues that Congress, accordingly, should be able to delimit the President's more

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1. *NLRB v. Canning*, 134 S. Ct. 2550, 2557 (2014).
  2. Theoretically, Congress could direct the President or administrative agency to afford litigants fewer rights as well.

general Article II managerial authority over adjudicative officials as well. Finally, this Article considers the propriety of congressional directives that curb executive management efforts, particularly the congressional specification in the Administrative Procedure Act (“APA”)<sup>3</sup> that Administrative Law Judges enjoy decisional independence.

## I. THE NATURE OF ADJUDICATION WITHIN THE EXECUTIVE BRANCH

Congress long has delegated extensive authority to the executive branch to adjudicate a wide variety of claims against the government, as reflected currently in the millions of immigration, veterans, and Social Security Disability cases resolved each year.<sup>4</sup> Moreover, it has delegated authority (albeit less commonly) for agencies to adjudicate disputes among private parties, as between labor and management under the National Labor Relations Act,<sup>5</sup> and formerly between shippers and common carriers under the Interstate Commerce Act.<sup>6</sup> Adjudicatory authority is a familiar feature of agency terrain.

In placing adjudications within the executive branch, Congress presumably intends agencies, at least at times, to exercise policymaking through adjudication.<sup>7</sup> As within any common law system, rules to govern future behavior emerge through the adjudicative process. Private individuals and firms consult the decisions to order their behavior in the future. Congress cannot, of course, delegate traditional private rights to the executive branch for adjudication, but it can

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3. 5 U.S.C. § 500 (2012).
  4. *See Veterans Benefits Administration Reports*, U.S. DEPARTMENT OF VETERANS AFFAIRS, [http://www.benefits.va.gov/reports/detailed\\_claims\\_data.asp](http://www.benefits.va.gov/reports/detailed_claims_data.asp) (May 2, 2015) (showing more than half a million pending claims as of February 2015); Backlog of Pending Immigration Cases as of March 2015, TRAC IMMIGRATION [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) (last visited May 6, 2015) (showing more than 400,000 pending claims); Annual Statistical Supplement, 2014, SOCIAL SECURITY ADMINISTRATION, <http://ssa.gov/policy/docs/statcomps/supplement/2014/2f4-2f6.html> (last visited Feb. 16, 2015) (showing more than three million received disability insurance claims in fiscal year 2013).
  5. 29 U.S.C. § 151 (2012).
  6. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 238–46 (1973).
  7. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (“To insist upon one form of action to the exclusion of the other is to exalt form over necessity.”); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (“[S]urely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.”).

delegate a panoply of public rights for executive branch adjudication,<sup>8</sup> whether before Article I courts or administrative agencies.

Consider litigation within the Securities and Exchange Commission. If the President could no longer appoint or remove SEC Commissioners, a court might conclude that he had insufficient influence over elaboration of critical financial policy. Adjudication within the executive branch involves not only factfinding but policy elaboration. Agencies such as the NLRB make policy almost exclusively through adjudication,<sup>9</sup> and it was the SEC's policymaking authority that triggered one of the Supreme Court decisions most deferential to agency policymaking through adjudication.<sup>10</sup> In *SEC v. Chenery*, the Court upheld the agency's authority to fashion new policy in the midst of a utility reorganization and then to apply that policy retroactively, stressing that the agency "has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order."<sup>11</sup> Moreover, those rules can be articulated in adjudications because "[t]here is . . . a very definite place for the case-by-case evolution of statutory standards."<sup>12</sup>

Policymaking, therefore, frequently arises out of the adjudications that Congress entrusts to the executive branch. Agencies are to interpret gaps in statutes and regulations<sup>13</sup> and determine the broad frameworks within which facts are to be assessed. And, as the Supreme Court famously explained in *Chevron v. Natural Resources Defense Council*,

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself

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8. Congress can, however, delegate private rights that have been federalized. See, e.g., *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 594 (1985) (upholding a federal statute requiring arbitration of private disputes arising from a government registration scheme).
  9. Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274 (1991); see also *Bell Aerospace Co.*, 416 U.S. at 293–94 (discussing previous cases in which the NLRB set policy through adjudication).
  10. *Chenery*, 332 U.S. at 202–03.
  11. *Id.* at 199.
  12. *Id.* at 203.
  13. Courts defer to statutory construction under the familiar *Chevron* construct. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>14</sup>

Absent sufficient say in development of that policy, Presidents could no longer superintend development of the tasks delegated to the executive branch by Congress.

Aside from policymaking through statutory interpretation or crafting rules in adjudication, agencies also make policy less directly by crafting presumptions arising in adjudication. The Supreme Court has upheld the agency's right to create such presumptions in particular factual contexts. In *Republic Aviation Corp. v. NLRB*,<sup>15</sup> the question presented was whether an employer impermissibly discharged three employees for wearing UAW-CIO union steward buttons.<sup>16</sup> The employer argued that if it allowed employees to wear such buttons, employees would think that it implicitly favored that union, and it would thereby interfere with its employees' choice of a representative. The statutory touchstone was whether the employer's conduct discriminated against the employees by discharging them because of protected conduct. Motive is the linchpin. The Board created a presumption that an employer's permission for employees to wear union steward buttons, at least where there was no competing labor organization at the plant, did not imply recognition or support of that particular union. The Supreme Court ultimately affirmed, reasoning that, after a hearing, an agency may "infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven."<sup>17</sup> Agencies can generate rebuttable presumptions based upon the likelihood that certain facts constitute evidence of a statutory violation. Those presumptions reflect policymaking.

Agencies not only can create presumptions, but they also can derive inferences from sets of facts based on their particular knowledge of the field. Even through factfinding, agencies fashion a type of subsidiary policy. When agencies decide the weight to be accorded certain facts, or the likelihood that particular facts will occur in tandem, they set precedent for future decision makers. Those inferences, while not governing private parties directly, set policy for future adjudications and affect the rights of private parties. In *Penasquitos Village, Inc. v. NLRB*,<sup>18</sup> for example, the principal question concerned whether companies had wrongfully terminated two employees in derogation of

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14. *Id.* at 865–66.

15. 324 U.S. 793 (1945).

16. *Id.* at 795.

17. *Id.* at 800.

18. 565 F.2d 1074 (9th Cir. 1977).

their statutory rights protected under the National Labor Relations Act.<sup>19</sup> The ALJ, after hearing all of the testimony, credited the testimony of the employer's supervisor that the employees were dismissed because of the slow pace of their work. The NLRB, however, reversed the ALJ, concluding that because the supervisor knew the employees were leaders of an organizational effort at the worksite and had not previously warned the employees, the discharge was pretextual. The court of appeals agreed that it was the agency's province to derive inferences from the facts and thereby set policy.<sup>20</sup>

Consider, as well, the more recent decision in *Elliott v. Commodity Futures Trading Commission*.<sup>21</sup> There, the issue concerned whether brokers had engaged in prearranged, and therefore illegal, trades of commodities.<sup>22</sup> The ALJ sided with the brokers, relying on the testimony of the brokers and two other traders. The ALJ concluded that the trades had not been prearranged but rather that the market had provided only limited competition. The Commodities Future Trading Commission reversed, relying instead on the structure and timing of the trades. From the pattern of trading, it inferred that they were prearranged and hence in violation of the commodities act.

On review, a divided Seventh Circuit upheld the agency. It held that the agency acted within its expertise in overturning the ALJ's factfinding based on the inferences it drew from the patterns. In support, it provided an oversimplified example:

[A] police officer can testify that he was suspicious of a driver because he thought it unusual that a car was driving slowly and not using turn signals. The officer would be allowed to draw inferences from these facts without presenting evidence that cars usually drive faster on that particular street (much less evidence of the normal speed at which they drive). The factfinder could rely on its own experience to conclude that this sort of behavior was out of the ordinary.<sup>23</sup>

The agency thus can use its experience to derive inferences from factual patterns arising within its expertise and set agency policy for the future.

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19. *Id.* at 1076. In the particular case, however, a majority of the court determined that the Board's derivative inferences stemmed in part from discredited testimony and thus concluded that the discharge of the employees should be upheld. *Id.* at 1083–84.

20. *Id.* at 1078–79; *see also* *United Steelworkers of Am. v. NLRB*, 482 F.3d 1112, 1117 (9th Cir. 2007) (“When, as here, the Board accepts the ALJ’s basic factual and credibility determinations, it may draw inferences and conclusions from them different from the ALJ’s.” (citing *Int’l Union v. NLRB*, 834 F.2d 816, 819 (9th Cir. 1987))).

21. 202 F.3d 926 (7th Cir. 2000).

22. *Id.* at 927.

23. *Id.* at 936.

At stake, therefore, is control over administrative policy delegated by Congress. When Congress delegates adjudications to the executive branch, should Presidents have equal say in controlling the policy generated through adjudication as through rulemaking and enforcement?

## II. A BRIEF HISTORY OF ADJUDICATION WITHIN THE EXECUTIVE BRANCH

A turn to history does not help illuminate the question above because, for the few adjudications delegated by Congress to the executive branch in the first years of the nation, Presidents exercised virtually unfettered discretion in molding the adjudications. Congress delegated adjudicative authority to the executive branch without limiting Presidential control to any extent. As a result, the policy emerging from the delegated authority reflected that of the President, and there was no need to accommodate a congressional interest in safeguarding adjudicative independence with the President's interest in superintending delegated authority.

In the Founding generation, the executive branch assessed claims against it in a variety of ways. For instance, in the first generation, Commissioners and others assessed claims for pensions without the niceties of formal litigation. Executive control was plenary, and the right of judicial review nonexistent. In the absence of direction from Congress, the executive sought to manage the adjudication as efficiently as possible. Executive control over adjudication was similar to that over policymaking generally.

With respect to veterans' claims, the first Congress provided compensation to disabled veterans.<sup>24</sup> The act, however, did not include a claims resolution or adjudication mechanism. The implication was that the executive should proceed as it deemed appropriate. In 1792, Congress remedied that oversight in passing the Invalid Pension Act, which assigned Article III judges the task of recommending eligibility for pensions to the Secretary of War.<sup>25</sup> The Supreme Court later held that Congress could not, consistent with the dictates of an independent judiciary under Article III, impose nonjudicial duties upon Article III judges.<sup>26</sup> The Court reasoned that the claims resolution process involved nonjudicial duties because the Secretary of War enjoyed the final say

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24. An Act Providing for the Payment of the Invalid Pensioners of the United States, 1 Stat. 95 (1789).

25. An Act to Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established and to Regulate the Claims to Invalid Pensions, 1 Stat. 243 (1792).

26. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792).



as to whether the pensions would be paid.<sup>27</sup> Congress responded in 1803 by vesting the authority to decide claims directly in the Secretary of War, thereby removing the judges from the process altogether.<sup>28</sup> Under the Revolutionary War Pension Act in 1818,<sup>29</sup> all veterans could receive benefits if they could show that they had served and were in “reduced circumstances.”<sup>30</sup> By that Act, disability was no longer the touchstone for receiving benefits.<sup>31</sup> The executive branch, therefore, fleshed out the meaning of “reduced circumstances” in the diverse contexts in which veterans lived.

Practice under the 1818 Act is illustrative. Claims evidently were considered either by pension clerks working directly for the Pension Bureau or by state judges. There were no formal hearings, and the clerks and state judges made decisions on the papers submitted by the veterans.<sup>32</sup> Disappointed claimants could appeal to Congress for a private bill of relief. When, later in the century, claimants attempted to access the courts, the Supreme Court rebuffed the effort on the ground that “[n]o pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.”<sup>33</sup> Accordingly, the process accorded claimants was of no legal importance,<sup>34</sup> and Congress vested in the executive full control over management of the process.

For another example, Jerry Mashaw related in his series on the history of administrative law<sup>35</sup> that Congress in 1794 appropriated money for those who fled a Saint Domingo insurrection “in such manner, and by the hands of such persons, as shall, in the opinion of the

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27. *Id.*

28. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VET. L. REV. 135, 145 (2011).

29. 3 Stat. 410 (1818).

30. *Id.*

31. See A.F. Sisson, HISTORY OF VETERANS' PENSIONS AND RELATED BENEFITS 12 (1946).

32. For the controversies spawned in implementing the program, see JOHN RESCH, SUFFERING SOLDIERS: REVOLUTIONARY WAR VETERANS, MORAL SENTIMENT, AND POLITICAL CULTURE IN THE EARLY REPUBLIC 119–45 (1999) (detailing the scandals that arose when applications increased under the 1818 Act).

33. United States *ex rel.* Burnett v. Teller, 107 U.S. 64, 68 (1883).

34. At times, members of Congress represented claimants, a practice that illustrates the lack of formality. See LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861, at 417–18 (1954).

35. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

President, appear most conducive to the humane purposes of this act.”<sup>36</sup> Moreover, after the Whiskey Rebellion, Congress assigned the executive the authority to appoint a “board of inquest” to assess damages from the rebellion and grant compensation “to aid such of the said sufferers as, in his opinion, stand in need of immediate assistance.”<sup>37</sup> Congress provided the executive no details of the mechanism to use in making the compensation determinations.

These examples suggest that Presidents have long exercised substantial control in shaping the claims resolution processes set into motion by Congress. Presidents directed clerks and others to resolve claims, and affected individuals had no recourse to the courts. In the absence of any congressional specification, Presidents enjoyed authority under Article II to oversee the adjudication. Individuals enjoyed no Due Process rights to an independent judicial officer insulated from presidential supervision.<sup>38</sup> Congress, for the first 150 years of our history, seldom delimited the President’s discretion in deciding claims left to his resolution.

### III. PRESIDENTIAL CONTROL THROUGH THE APPOINTMENT AND REMOVAL AUTHORITIES

In the last seventy-five years, however, Congress more frequently has conditioned the way in which the executive branch is to carry out delegated adjudicative tasks. The question, then, is how to accommodate such congressional direction with the Article II interest in superintending all delegated authority.

The appointment and removal authorities represent the formal means by which a President influences executive branch policymaking. Although party and personal loyalty may, at times, be as effective, there is no question but that through both means Presidents can shape the policy formulated by subordinates, whether reached through rulemaking, enforcement, or adjudication.

On the one hand, fundamental norms of fairness suggest the wisdom of separating adjudication from political control. Given those norms, perhaps Congress can insulate adjudication within the executive branch more than rulemaking and enforcement. On the other hand, why differentiate different types of policymaking within the executive branch? Agency officials fashion executive policy whether acting

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36. *Id.* at 1298 (citing 6 Stat. 13 (1794)).

37. *Id.* (citing 4 ANNALS OF CONGRESS 1001–02 (1794) (statements of Representatives Gilbert and Boudinot)).

38. *See* *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (upholding delegation of workmen’s compensation scheme to agency and rejecting a Due Process attack to administrative adjudication of eligibility); *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (upholding against a Due Process attack adjudication carried out by state medical board that exercised both investigative and adjudicative tasks).

through rulemaking, enforcement, or adjudication. Accordingly, this Article next explores whether the President's power to appoint and remove adjudicatory officials is as plenary as over officials exercising regulatory and enforcement authority, before turning in Part IV to the question whether the President's inherent managerial power should be as great in the adjudicatory context as it is in the others.

#### *A. The Appointment Power*

With respect to the appointment power, Presidents select judicial officials, whether serving on the bench or in agencies, as well as enforcement officials. Presidents gain influence over adjudication through the power to determine the identity of the officials exercising judicial power. Under Article II, the President must have authority to appoint all superior officers such as Article III judges.

Congress also can vest the appointment of subordinate judicial officials in the President but can select as well (with a qualification discussed *infra*)<sup>39</sup> the heads of departments or courts of law. Although the President currently does not have the power to appoint all lower-level judicial officials, heads of departments typically appoint such judicial officials, and thus control remains with the executive branch. In *Ryder v. United States*,<sup>40</sup> for instance, the Court invalidated appointment of civilians on the Coast Guard Court of Military Review on the ground that the appointment circumvented Article II and thereby divested the President of sufficient say in elaboration of adjudicative policy.<sup>41</sup> More recently, the D.C. Circuit struck down the Librarian of Congress's appointment of members of the Copyright Royalty Board because the Board members, as principal officers exercising judicial functions, could only be appointed by the President.<sup>42</sup> In contrast, in *Edmond v. United States*,<sup>43</sup> the Court upheld the Secretary of Transportation's appointment of judges on the Coast Guard Court of Criminal Appeals on the ground that they were inferior officers,<sup>44</sup> and the Court in *Freytag v. Commissioner*<sup>45</sup> did the same with respect to Tax Court special trial judges.<sup>46</sup> The extent of judicial

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39. Congress might vest appointment of inferior judicial officers in the courts of law. See *infra* notes 54–59 and accompanying text.

40. 515 U.S. 177 (1995).

41. *Id.* at 182–84.

42. *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012). The court's cure was to convert the Board members to inferior officers.

43. 520 U.S. 651 (1997).

44. *Id.* at 660–61.

45. 501 U.S. 868 (1991).

46. *Id.* at 873.

duties and degree of authority exercised determine whether the judicial officials are superior or inferior officers.<sup>47</sup>

The appointment power provides Presidents with the ability to choose individuals whom they trust to carry out law enforcement, rule-making and adjudication. By itself, however, the appointment power provides Presidents with limited control given that officials and judges may veer from the policy preferences of a President. The first President Bush's appointment of David Souter to the Supreme Court resulted in a liberal voting pattern and thus provides an illustration of the imperfect control of the appointment power.<sup>48</sup> Nonetheless, the appointment power is a key facet of the presidential power to carry into effect the laws set in motion by Congress.

Congress cannot choose the officials to preside over adjudications, other than to determine in the case of an inferior officer whether the President or some other entity outside Congress is to appoint the official. If the judicial officer does not rise to the level of an inferior officer, then Congress need not place the appointment in the hands of the President, head of a department, or the courts of law. For instance, in *Landry v. FDIC*,<sup>49</sup> the D.C. Circuit determined that an FDIC ALJ was not an inferior officer but merely an employee, principally because the ALJ had no formal decisionmaking authority but merely recommended decisions to the agency for resolution.<sup>50</sup> The ALJ's factfinding authority by itself was insufficient to meet the "significant authority pursuant to the laws of the United States" test<sup>51</sup> to determine officer status. Even though the FDIC often deferred to ALJ factfinding, de facto authority could not be equated with "officer" status. And, in *Tucker v. Commissioner of Internal Revenue*,<sup>52</sup> the same court held that settlement officers at the IRS Office of Appeals were not inferior officers, principally because their discretion was highly constrained.<sup>53</sup> Employees typically are covered by the Civil Service laws and shielded from at-will dismissal. In any event, Congress presumably can take no

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47. *Edmond*, 520 U.S. at 662.

48. See Ed Lazarus, *Four Enduring Myths About Supreme Court Nominees*, TIME (May 26, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1900851\\_1900850\\_1900845,00.html](http://content.time.com/time/specials/packages/article/0,28804,1900851_1900850_1900845,00.html).

49. 204 F.3d 1125 (D.C. Cir. 2000).

50. *Id.* at 1134. Similarly, in *Tucker v. Commissioner of Internal Revenue*, 676 F.3d 1129 (D.C. Cir. 2012), the D.C. Circuit held that Tax Court appeals officers are employees within the meaning of Article II because their discretion was highly constrained and subject to supervision. *Id.* at 1134.

51. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

52. 676 F.3d 1129 (D.C. Cir. 2012).

53. *Id.* at 1133.

direct role in the selection of employees who work within the executive branch.

The Court has recognized a limited exception to presidential power over appointments. In *Morrison v. Olson*,<sup>54</sup> the Court upheld an unusual interbranch appointment of an executive branch official.<sup>55</sup> Under the Ethics in Government Act,<sup>56</sup> Congress vested in a special division of the D.C. Circuit the power to appoint an independent counsel, whom the Court deemed to be an inferior officer within the executive branch. Although the appointment robbed the President of his customary power to determine the identity of officials administering the law, the Court upheld the interbranch appointment, reasoning that the Appointments Clause included no explicit prohibition on interbranch appointments given that Congress under Article II can vest the appointment of an inferior officer “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>57</sup> The Court acknowledged that such appointment could violate the separation of powers if it deprived one branch of its power to fulfill its constitutional obligations and “would be improper if there was some ‘incongruity’ between the functions normally performed by the courts and the performance of their duty to appoint.”<sup>58</sup> Thus, it is likely that courts would find appointment by the courts of law of judicial officials in the executive branch more “congruous” than appointment by the courts of law of enforcement officials. One can imagine, for instance, a role for Article III judges in appointment of judicial officials working on Article I tribunals such as the Court of Federal Claims or the Tax Court.<sup>59</sup> Or, Congress could empower Article III judges to appoint ALJs. To that limited extent, therefore, Presidents have less power to appoint judicial officials than others within the executive branch.

### *B. The Removal Authority*

Presidents have argued, and courts have agreed,<sup>60</sup> that the President’s removal authority is largely derivative of the power to appoint. Although not explicit, Article II vests in the President the

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54. 487 U.S. 654 (1988).

55. *Id.* at 696–97.

56. 28 U.S.C. §§ 591–98 (1994) (no longer in effect due to nonrenewal).

57. U.S. CONST. art. II, § 2, cl. 2.

58. *Morrison*, 487 U.S. at 676; *see also Ex parte Siebold*, 100 U.S. 371, 398 (1880) (upholding judicial appointment of election supervisors vested with some enforcement responsibility).

59. For a proposal that Article III judges appoint ALJs, *see* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013).

60. *See e.g., Morrison*, 487 U.S. at 670–71 (determining the removal of an officer under the appointment power).

power to remove from office principal (and, at times, inferior) officers exercising law administration and rulemaking authority, such as for heads of administrative agencies. At times, the President's removal authority is plenary, but the Court has also recognized that Congress can limit the President's control over principal officers when not incompatible with his ability to manage the executive branch.<sup>61</sup> Although Congress can shut down an agency, it can take no direct role in removing any official from office other than through impeachment.<sup>62</sup>

The removal authority provides Presidents with a formal way to ensure that subordinate officials toe the line in exercising duties delegated by Congress, creating a type of "'here-and-now subservience.'"<sup>63</sup> At the same time, the removal authority links acts of subordinates to the President in the public eye.

As applied to judicial officials, the removal power ensures that the President can discharge officials at least for "cause." Even though the parameters of cause have not been fleshed out by the Court, it would plainly empower the President to remove officials who abuse the public trust. If an Article I judge on the Tax Court were rude to litigants, the President could remove the judge from office. The President could also remove judicial officials who neglected their duties or engaged in improprieties off the bench.

In *Kuretski v. Commissioner*,<sup>64</sup> taxpayers sought to invalidate tax assessments on the ground that the President's power to remove an IRS Commissioner for cause violated the separation of powers.<sup>65</sup> They argued that the potential for removal meant that Article I judges would be too deferential to the President's interests and thereby counter Congress's design of an independent Tax Court. The D.C. Circuit rebuffed the challenge, reiterating that "Congress may afford the [judicial] officers . . . a measure of independence from other executive actors, but they remain Executive-Branch officers subject to presidential removal."<sup>66</sup> Setting aside what constitutes "cause," the removal authority remains a principal means by which Presidents superintend the authority delegated from Congress.

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61. See *Morrison*, 487 U.S. at 675–77. Congress has the power to create independent agencies within the executive branch, which typically refers to the fact that Congress can shield the head of such agencies from plenary removal. See *id.* at 687.

62. See e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

63. *Id.* at 727 n.5 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.C. Cir. 1986)).

64. 755 F.3d 929 (D.C. Cir. 2014).

65. *Id.* at 932.

66. *Id.* at 944.

With respect to the removal power, the Court has suggested that Presidents have *less* authority over judicial officials as opposed to others within the executive branch. Most notably, the Court first suggested limits to executive control over adjudication in *Humphrey's Executor v. United States*.<sup>67</sup> There, the Court considered whether the President enjoyed the plenary right of removal over the head of the Federal Trade Commission, even though Congress had specified that the Commissioner could only be removed for cause. The Court distinguished *Myers v. United States*,<sup>68</sup> which had upheld the President's inherent right to remove an officer of the United States for any reason at all,<sup>69</sup> on the ground that the FTC Commissioner exercised both quasi-legislative and quasi-judicial power.<sup>70</sup> Of relevance here, the Court stated that the

Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed . . . or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.<sup>71</sup>

The Court further elaborated that “[u]nder § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.”<sup>72</sup> Indeed, the Court stated that a rule recognizing an executive plenary removal authority over the FTC Commissioner would necessitate recognizing such authority over “judges of the legislative Court of Claims, exercising judicial power.”<sup>73</sup> Given that judicial officials within the executive branch routinely resolve cases between claimants and the government, removing judges for being too anti-government would prevent the very aims of establishing a formal judicial procedure. Presidents should be able to remove such officers for cause, but not for accumulating a claimant-friendly record.

The Supreme Court maintained the *Humphrey's Executor* differentiation in *Wiener v. United States*.<sup>74</sup> The Court held that the President did not enjoy plenary removal authority over a War Claims

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67. 295 U.S. 602, 604 (1935).

68. 272 U.S. 52 (1926).

69. *Id.* at 176.

70. *Humphrey's Executor*, 295 U.S. at 627–28.

71. *Id.* at 628.

72. *Id.*

73. *Id.* at 629.

74. 357 U.S. 349, 353 (1958).

Commissioner even when the statute establishing the office did not, as in *Humphrey's Executor*, attempt to limit the President's removal authority. The Court explained that "[w]hen Congress has for distribution among American claimants funds derived from foreign sources, it may proceed in different ways. Congress may appropriate directly; it may utilize the Executive; it may resort to the adjudicatory process."<sup>75</sup> Moreover, the "fact that it chose to establish a Commission to 'adjudicate according to law' the classes of claims defined in the statute did not alter the intrinsic judicial character of the task."<sup>76</sup> Finally, "[i]f, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hung over the Commission the Damocles' sword of removal."<sup>77</sup> The President could not, therefore, remove a judicial official within the executive branch from office absent cause. The Court would not lightly impute to Congress an intent to countenance plenary removal authority over judicial officials. The Court signaled that it would more readily find in the statutory language a congressional intent to limit the President's removal of judicial as opposed to other executive branch officials.

The Court's subsequent decision in *Morrison v. Olson*<sup>78</sup> arguably has limited the President's plenary removal authority further than in *Humphrey's Executor* and *Wiener*. There, the Court considered the constitutionality of Congress's determination to shield the independent counsel under the Ethics in Government Act of 1978 from the executive's plenary removal authority.<sup>79</sup> Under the Act, the Attorney General could remove the independent counsel only for cause. The Court acknowledged that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General . . . exercises over the investigation and prosecution of a certain class of alleged criminal activity."<sup>80</sup> The question was not, as in *Humphrey's Executor* and *Wiener*, whether the official exercised quasi-judicial or quasi-legislative power. Rather, in light of the congressionally imposed limitation on the removal authority, the question was whether the Executive retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."<sup>81</sup> In *Morrison*, the Court concluded that in light of the

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75. *Id.* at 355.

76. *Id.*

77. *Id.* at 356.

78. *Morrison v. Olson*, 487 U.S. 654 (1988).

79. *Id.* at 696–97.

80. *Id.* at 695.

81. *Id.* at 696.



limited scope of the independent counsel's duties and the limited duration of the office, the Attorney General's ability to remove the counsel for cause was sufficient to accord with separation of powers principles.

As applied to a judicial official, the formulation in *Morrison* likely would yield the same result as in *Humphrey's Executor* and *Wiener*: limiting the President or subordinate executive official's power to remove a judicial officer for cause would preserve in the executive "sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties."<sup>82</sup> The President would not have any direct way to ensure that agency heads wisely fashion policy through adjudication, but *Morrison* suggests that such restrictions are permissible for enforcement officials as well. The Court will uphold congressionally established for-cause limitations on the removal of judicial officials. Thus, Congress can insulate (to a certain degree) judicial officials within the executive branch from the President's control.

The Supreme Court's more recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*<sup>83</sup> slightly revises the constitutional terrain once again, but in a way reaffirming that Congress can condition the removal of officials who solely engage in adjudication. In the context of an agency (the PCAOB) subject to oversight by the Securities and Exchange Commission, the Court held that two layers of insulation from the President's removal authority left the President with too little constitutional control over the exercise of delegated authority. Because of the two layers of insulation, "the President could not be held fully accountable for discharging his own responsibilities."<sup>84</sup>

As with other agencies, the PCAOB exercised a mixture of rulemaking, enforcement, and adjudicative duties. But the Court was clear that its two-layer rule will not apply to purely adjudicative officials such as ALJs.<sup>85</sup> Although there are many judicial officials within the executive branch whose supervisors are subject to plenary removal, Congress in its discretion can limit the removal of judicial officials even when the supervisors of such judicial officials can only be removed for cause. In other words, Congress can insulate judicial officials by inserting two layers of cause protecting them from discharge.<sup>86</sup>

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82. *Id.*

83. 561 U.S. 477 (2010).

84. *Id.* at 514.

85. *Id.* at 507 n.10.

86. Nonetheless, there has been a recent spate of challenges to SEC adjudication on the ground that the "for cause" protection for ALJs is incompatible with the PCAOB decision. See Peter J. Henning, *SEC Faces*

The Court's decision in *Free Enterprise Fund* expanded the President's power under Article II with respect to other executive branch officials, reflecting an accountability version of Article II authority—the President must have the tools to ensure superintendence over law execution. As the Court stated, “[by] granting the Board executive power without the Executive’s oversight, this Act subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.”<sup>87</sup> But the Court did not hold that the concern for Article II accountability extended to officials exercising solely adjudicative functions, presumably because the public does not “pass judgment” on presidential supervision of judging to the same extent as regulation and law enforcement. Thus, even after *Free Enterprise Fund*, Congress can limit the removal of adjudicative officials within the executive branch to “cause.”

In the absence of a for-cause limitation, however, it is not as clear whether courts will impute to Congress an intent to shield the official from at-will removal as it did in *Wiener*. For instance, in *Kalaris v. Donovan*,<sup>88</sup> decided after *Wiener* but before *Morrison*, the Secretary of Labor attempted to remove two members of the Benefits Review Board without specifying the reasons for removal. The hearing officers argued, and the district court agreed, that Congress—as in the War Claims Commission context—would not have wished to give the Secretary of Labor plenary removal authority over hearing officers exercising the “‘quasi-judicial’ function of adjudicating ‘private rights.’”<sup>89</sup> Plenary removal, from that perspective, was incompatible with judicial independence.

The D.C. Circuit Court disagreed, finding that Congress could well have envisioned close managerial control over judicial officials and that, in the absence of congressional direction setting forth terms of office, Presidents could exercise a plenary removal authority. The court acknowledged that the Board was “performing a ‘quasi-judicial’ function” but noted that “this general characterization does little to distinguish the Board, constitutionally, from the scores of administrative boards and tribunals in the Executive Branch that currently adjudicate claims to federal statutory rights.”<sup>90</sup> Indeed, the court noted “there are suggestions in the history of the Act and its subsequent administration that Congress affirmatively intended for Board members, as part of the Department of Labor’s staff, to serve as other

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*Challenges Over the Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES, Jan. 27, 2015.

87. *Id.* at 498.

88. 697 F.2d 376 (D.C. Cir. 1983).

89. *Id.* at 393.

90. *Id.* at 400.

appointed officials serve—at the discretion of the Secretary.”<sup>91</sup> Viewed another way, individuals enjoy no Due Process right to an adjudicator insulated from plenary removal, even when the entity possessing the limited removal authority has an interest in the results of the adjudication. Congress can limit the removal authority over judicial officials within the executive branch; moreover, in the absence of any specific congressional restriction, courts must divine from the context whether an intent to shield the official should be imputed to Congress.

Affording Congress more leeway to insulate adjudicative, as opposed to regulatory and enforcement, officials conforms to intuition. If Congress wishes to shield judicial officials from presidential appointment, it likely can do so except in the case of principal officers, and if Congress wishes to condition the executive’s power to remove all such officials within the executive branch, it would likely be successful as well. Such limitations would accord with the rule in *Morrison v. Olson* that all such arrangements must leave the executive branch with control over the essential attributes of the executive power.

As a consequence, the President’s authority over the policymaking arising from adjudication need not be as complete as over policymaking by regulators or enforcement officials. In the Court’s view, the process by which policymaking is reached makes a difference—judicial-type process can be shielded from executive control more completely than when other means of fashioning policy are provided, even though the policy emerging from both may be similar.<sup>92</sup> Perhaps in the public eye, there is less reason to link adjudication to presidential authority than to forge a link between officials who make and enforce rules. *Humphrey’s Executor*, *Wiener*, *Free Enterprise Fund*, and the like all acknowledged the distinctive case for insulating adjudicative officials from close presidential control, even though the Court itself has recognized that adjudicators shape policy while engaging in factfinding.<sup>93</sup>

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91. *Id.* at 390.

92. Congress, of course, can choose to resolve claims on its own. Although Justice Powell sought to gird invalidation of the one-house veto in *INS v. Chadha*, 462 U.S. 919, 967 (1983) (Powell, J., concurring), on Due Process grounds, his colleagues on the Court did not follow his lead. And, there is no judicial review possible when Congress denies a petition for a stay of deportation or for a monetary claim. The Supreme Court has held that it is for Congress to determine the structure and fairness of adjudication of public rights, whether in Congress or the executive branch. And Congress’s control over adjudication is plenary if it chooses *not* to delegate tasks to the executive branch, assuming that no Due Process issue arises.

93. See *supra* text accompanying notes 67–85; see also Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211–14 (2013) (similarly charting the change in the Court’s jurisprudence).

#### IV. MANAGERIAL AUTHORITY OVER ADJUDICATIVE OFFICIALS IN THE EXECUTIVE BRANCH

Although others have noted that the President's appointment and removal authority over adjudicative officials within the executive branch need not be as firm as over other officials,<sup>94</sup> they have not explored the corollary: In addition to the formal controls of appointment and removal is the President's more intangible managerial oversight over judicial officials also weaker?<sup>95</sup> Accordingly, this section first explores the President's general managerial authority under Article II and then concludes that Congress more readily can block executive branch managerial efforts over judicial than over regulatory and enforcement officials.

##### A. *Presidential Managerial Controls*

Congressional delegation to specific executive branch officials has not precluded Presidents from exercising managerial oversight in addition to the controls of appointment and removal. Without such oversight, there would be little coordination among agencies, resulting in duplication and waste.<sup>96</sup> Article II, in other words, has been read to vest in the President power to take steps to manage the authority delegated by Congress to the executive branch. Presidents have established task forces cutting across agencies to permit joint efforts in combatting poverty or illegal immigration. They have created platforms to facilitate cross-agency discussion of issues of common concern and have also set up mechanisms to resolve disputes among agencies.<sup>97</sup> In *National Mining Association v. McCarthy*,<sup>98</sup> the D.C. Circuit recently stated that “[u]nder Article II of the Constitution, departments and agencies in the Executive Branch are subordinate to one President and may consult and coordinate to implement the laws passed by

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94. *E.g.*, Kevin M. Stack, *Agency Independence after PCAOB*, 32 CARDOZO L. REV. 2391, 2391–93 (2011); Vermeule, *supra* note 93; Barnett, *supra* note 59.

95. These controls undoubtedly have increased over time. Congress in the early years at times delegated authority to subordinate officials with such specificity that little oversight was contemplated. *See* FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 136–37 (1905).

96. *Cf.* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1196–1209 (2012) (arguing that the executive branch should help coordinate agencies to solve challenges such as overlapping and fragmented delegations).

97. For the role of the Office of Legal Counsel in the Department of Justice, see Exec. Order No. 12,146, 3 C.F.R. 409 (1979).

98. 758 F.3d 243 (D.C. Cir. 2014).

Congress.”<sup>99</sup> Indeed, the court continued that “[i]n a ‘single Executive Branch headed by one President,’ we do not lightly impose a rule ‘that would deter one executive agency from consulting another about matters of shared concern.’”<sup>100</sup>

Moreover, Presidents have asserted greater managerial authority by requiring, in executive orders and less formal directives, that agencies follow particular policies, whether on contracting out goods and services<sup>101</sup> or banning smoking in the workplace.<sup>102</sup> These directives can fashion significant policy that could not otherwise be pursued. For several notable examples, President Truman used executive orders to spark the government’s fight against segregation by ordering that the military be desegregated.<sup>103</sup> The second President Bush created the Department of Homeland Security.<sup>104</sup> President Obama outlawed discrimination on the basis of sexual orientation in the federal workforce.<sup>105</sup> Indeed, President Obama’s recent initiative to defer deportation of certain categories of illegal immigrants stemmed from a presidential memo, not even an official executive order.<sup>106</sup> Although the appointment and removal authorities should not be ignored, Presidents manage the executive branch routinely through other means. In the absence of congressional direction to the contrary, Presidents can fashion policy to guide the way in which the executive branch fulfills the mission set by Congress.<sup>107</sup>

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99. *Id.* at 249.

100. *Id.* (quoting *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011)).

101. Memorandum from Office of Mgmt. & Budget, Exec. Office of the President to the Heads of Exec. Dep’ts and Establishments (May 29, 2003), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf).

102. Exec. Order No. 13,058, 41 C.F.R. § 74.315 (2013).

103. Exec. Order No. 9,981, 3 C.F.R. 722 (1949).

104. Editorial, *Mr. Ridge Goes to Washington*, N.Y. TIMES, Oct. 8, 2001, at A16.

105. Exec. Order No. 13,672, 79 FED. REG. 42,971 (July 23, 2014).

106. *See* Conn Carroll, *It Is Completely Irrelevant That President Obama Never Signed an Executive Order on Immigration*, TOWNHALL.COM (Dec. 11, 2014), <http://townhall.com/tipsheet/conncarroll/2014/12/11/it-is-completely-irrelevant-that-obama-never-signed-an-executive-order-on-immigration-n1930571>.

107. For an example of an executive order struck down because of a conflict with congressional policy, see *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996). For an example of an executive order struck down for lack of presidential authority, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

With administrative rulemaking as well, Presidents have exerted control over rulemaking by requiring agencies to comply with Executive Orders charting particular procedural steps before the agencies can announce certain major rules. Presidents Nixon, Ford, Carter, and Reagan attempted to ensure that agencies engaged in ever more stringent cost-benefit analysis before releasing rules.<sup>108</sup> Although the particular politics at stake was controversial, the constitutional basis for such executive orders was not. As the D.C. Circuit explained, “[T]he President’s power necessarily encompasses ‘general administrative control of those executing the laws’ throughout the Executive Branch of government. . . . His faithful execution of the laws enacted by the Congress . . . frequently requires the President to provide guidance and supervision to his subordinates.”<sup>109</sup> Thus, even when Congress delegates rulemaking or a quasi-legislative role to agencies, the President has a critical role to play in superintending the rulemaking.<sup>110</sup>

The extent of the President’s bureaucratic controls over adjudicative officials is not as clear. Given that Congress may leave the President less appointment and removal authority over judicial officers than others within the executive branch, the President’s general managerial authority over judicial officials arguably can be similarly circumscribed. Indeed, in *Myers v. United States* the Court stated that “there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.”<sup>111</sup> The President may not direct the conduct of subordinate judicial officials to the same extent as in rulemaking and enforcement. Should judicial officials, therefore, whether appointed by the President, heads of departments, or courts of law, report up the chain of command just

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108. President Ford through Executive Order No. 11,821 required all agencies to prepare Economic Impact Statements to submit to the Council on Wage and Price Stability. Exec. Order No. 11,821, 3 C.F.R. 926 (1975). President Carter sought to increase public participation in rulemaking through Executive Order No. 12,044. Exec. Order No. 12,044, 3 C.F.R. 152 (1978). Under Executive Order No. 12,291 and then 12,498, President Reagan provided for centralized controls over all major agency rulemakings. Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,498, 3 C.F.R. 323 (1986). Under the orders, each agency had to ensure that the delineated benefits in all rules exceeded their costs. Agencies prepared a Regulatory Impact Analysis and submitted proposed rules to OMB for its independent study and comment prior to publication. Presidents since have continued centralization of rulemaking.

109. *Building & Construction Trades Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) (internal citation omitted).

110. For an argument that presidential supervision over enforcement has been surprisingly less comprehensive, see Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

111. *Id.* at 135.

like most enforcement and regulatory officials? Alternatively, should they be able to disregard directives if those directives interfere with their exercise of judicial functions prescribed by Congress?

In the absence of specification from Congress, Presidents should be able to manage judicial officers in the executive branch to the same extent as those exercising regulatory and enforcement functions. In addition to the power to appoint and remove from office, Presidents can issue directives on what steps to take and what issues to consider in resolving claims. In customs cases, for example, the executive branch should be able to create procedures to govern the claims and even clarify presumptions as to what amounts are due. At some point, presidential meddling might violate the Due Process Clause if an entitlement exists, but short of that possibility, Presidents can structure the adjudications that Congress entrusts to them as they see fit. Indeed, the history of pension and other claims resolved by the executive branch within our nation's first century of existence amply demonstrates the discretion enjoyed by the President, absent Congress's direction to the contrary. It is as if Congress directed the President personally to resolve the claims.

On the other hand, Congress routinely creates specific agencies to adjudicate particular claims. The President presumably cannot switch the NLRB's adjudications to the Department of Labor. Congress can also designate the particular officer, whether an ALJ or hearing examiner, to resolve particular claims. Congress has determined whether particular claims can be subject to judicial review, and it has directed when alternative dispute resolution as opposed to adjudication should be utilized.<sup>112</sup>

At some point, congressional limitation of presidential authority over adjudication within the executive branch violates the separation of powers doctrine. As discussed before, Congress must leave sufficient appointment and removal authority to allow the President some influence over the shape of the policymaking delegated to the executive branch. One price of vesting judicial authority within executive control is that the President cannot be divested of complete oversight. Congress cannot replicate the Article III protection of tenure for judicial officers in the NLRB or SEC. If Congress delegates sufficient authority to a judicial official, that official can only be appointed in conformance with the procedures in Article II.

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112. *E.g.*, 5 U.S.C. § 7119 (2012); 39 U.S.C. § 1207 (2012). *See generally* U.S. OFFICE OF PERSONNEL MGMT, ALTERNATIVE DISPUTE RESOLUTION HANDBOOK (explaining alternative dispute resolution and discussing federal agency use of alternative dispute resolution to resolve workplace disputes), *available at* <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf>.

Congress presumably could insulate agency officials who only engage in factfinding more completely than for those who also have a policy role. When adjudication essentially only includes factfinding, there is commensurately less executive power at stake.<sup>113</sup> Adjudication of facts resembles more of a routinized function although, as discussed previously, inferences in factfinding can shape the ultimate resolution of the case. Even in such adjudicatory contexts, therefore, an executive interest remains to ensure that the factfinding proceed in a way consistent with the executive's view of how best to implement the congressional command, but Congress can leave less discretion in the President's hands than in the regulatory and enforcement contexts.

*B. Accommodating Congressional Design of Administrative Adjudication with Executive Managerial Control*

Few conflicts have been triggered by congressional efforts to shield judicial officials in the executive branch from presidential management efforts. Congress often has provided scant details when delegating adjudicative authority to the executive branch. Thus, courts have not had occasion to chart the boundaries between the executive's interest in superintending all policymakers and a congressional interest in preventing executive meddling.

In this section, I first consider a recent example arising from a Veterans Administration controversy in which Congress sought to direct in detail how particular claims are to be adjudicated by the executive branch. I then examine the extent to which Congress through the APA more generally has sought to curb Article II managerial authority over adjudicative officials in the executive branch. The APA represents the principal means by which Congress has shaped adjudication within the executive branch. The APA does not address a myriad of details from scheduling status conferences to setting deadlines for decisions, leaving the executive branch a large measure of managerial authority. I conclude, however, that the APA's grant of decisional independence to ALJs, at a minimum, precludes the executive branch from influencing the decisions before the fact and from disciplining adjudicative officials for the substance of their decisions, no matter how poorly reasoned.

1. Veterans Access Act

In reviewing alarming reports of the delays and errors in processing veterans' claims at the Veterans Administration,<sup>114</sup> Congress this past

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113. *Cf.* *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 539 (1838) (holding that injunction against executive branch officer can lie to require performance of "ministerial" duties).

114. *See* VETERANS ADMIN. OFFICE OF INSPECTOR GEN., VETERANS HEALTH ADMIN. INTERIM REPORT: REVIEW OF PATIENT WAIT TIMES, SCHEDULING PRACTICES, AND ALLEGED PATIENT DEATHS AT THE



year evidently became concerned that the Merit Systems Protection Board (“MSPB”), the agency previously delegated the authority to review challenges to discipline, meted to certain high-level government employees, would treat too lightly those responsible for the problems plaguing the Veterans Administration. Accordingly, it somewhat bizarrely altered the review process for Senior Executive Service (“SES”) employees within the agency subject to discipline by (1) requiring an Administrative Judge in the MSPB to hear any appeal within twenty-one days or otherwise sustain the discipline; and (2) precluding review by the MSPB as a whole.<sup>115</sup> No review is provided beyond the administrative level. Administrative Judges perform comparable functions to the more familiar ALJs but outside the protections of the APA.<sup>116</sup>

The new law thus changed administrative practice in two fundamental ways. First, Congress forced strict timelines on the agency, requiring it to place any challenges from SES employees at the head of the line. Given the general delay in processing challenges, the twenty-one-day limit is unprecedented. The MSPB will have to prioritize the SES cases if it is to provide a forum at all. Indeed, it must adopt an e-filing system to permit such adjudication to go forward.<sup>117</sup> Moreover, the sanction is extraordinary—if the MSPB cannot hold the hearing and decide on the merits immediately, the Veterans Administration discipline will stand, depriving the employees of the opportunity to tell their side of the story before a neutral arbiter. Second, the legislation deprives the MSPB of policy oversight for the discipline. Congress, after all, previously delegated to the agency the policy role of determining when employee discipline should stand, not the Administrative Judges. Congress seemingly bypassed the Presidential appointees in delegating the unreviewed and unchecked adjudication to Administrative Judges who, given the *Landry* precedent, likely should not be considered officers of the United States subject to the Appointments Clause.

The MSPB itself questioned the constitutionality of Congress’s action in a letter to the President.<sup>118</sup> The MSPB stated in part that

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PHOENIX HEALTH CARE SYSTEM (May 28, 2014), *available at* [www.va.gov.oig/VAIOG-14-02603-178pdf](http://www.va.gov.oig/VAIOG-14-02603-178pdf).

115. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707, 128 STAT. 1754, 1798–99 (Aug. 7, 2014).

116. 5 U.S.C. § 1204 (2012); 5 U.S.C. § 3105 (2012).

117. Letter from Susan Tsui Grundmann, Chairman, U.S. Merit Systems Protection Board, to House and Senate Committees on Veterans’ Affairs (Aug. 21, 2014), *available at* <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1075012&version=1079327&application=ACROBAT>.

118. Letter from the U.S. Merit Systems Protection Board to President Barack Obama (Aug. 1, 2014), *available at* <http://www.mspb.gov/net>

[w]e believe that Section 707 which, as noted above, prohibits presidentially-appointed, Senate-confirmed officers of the executive branch from performing the responsibilities for which those officers were appointed and confirmed to carry out, is on weak constitutional footing. . . . Moreover, various courts have suggested that Congress is not permitted to infringe on the right of the executive branch to enforce the laws . . . .<sup>119</sup>

The letter warned of a precedent under which Congress could “undermine—through must-pass legislation . . . —the ability of presidentially-appointed, Article II Officers of the United States to carry out the mission of the agency to which they were appointed to lead.”<sup>120</sup>

Yet the new Act is consistent with Congress’s ability to curb agency management efforts. The twenty-one-day directive, even though it forces the executive agency to reprioritize cases for decision and create a new e-filing system, should pass constitutional muster.<sup>121</sup> Congress can design an adjudicative process for executive agencies to follow without violating Article II, even when creating burdens on federal agencies and making it more difficult for the President to oversee the adjudicative process.

Moreover, the MSPB’s argument that Congress impermissibly has circumvented Article II authority is no more compelling. The MSPB need not be accorded a role in overseeing all discipline cases. The desideratum of coordination is a policy call for Congress, not the agency.<sup>122</sup> To be sure, the Act vests the Administrative Judges as opposed to the MSPB with final decisionmaking authority in the SES cases, so that the Administrative Judges might now be considered inferior officers. But, given that the Administrative Judges were appointed by the MSPB members who are superior officers, no Appointments Clause issue should arise. Despite the MSPB letter, there is no Article II infirmity in bypassing the MSPB for this select group of claimants.

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[search/viewdocs.aspx?docnumber=1068653&version=1072950&application=ACROBAT](#).

119. *Id.*

120. *Id.*

121. For the first MSPB decision complying with the new congressional directive, see *Talton v. Dep’t of Veterans Affairs*, No. At-0707-0094-J-1 (Nov. 19, 2014) (sustaining VA discipline).

122. As long as Congress’s intent is clearly articulated, which it was in this instance. See *supra* text accompanying notes 100.

Nonetheless, the Due Process issues at stake are substantial. The SES employees presumably enjoy a Due Process right in their continuing employment.<sup>123</sup> The new statute affords a more prompt hearing after the discipline is meted but, if the twenty-one-day limit so curtails the type of hearing that the MSPB can afford, a Due Process challenge may be appropriate.<sup>124</sup> And if the MSPB cannot comply with the twenty-one-day rule, then the discipline stands. The lack of opportunity to contest the discipline in that situation cannot be squared with Due Process principles.

## 2. The APA

Congress has provided that much adjudication in the executive branch be subject to the APA's constraints.<sup>125</sup> Congress through the APA has determined that agency hearings are to be conducted before an administrative judiciary that is protected to some extent from agency interference. For instance, agencies that employ ALJs cannot hire or fire them, except for cause, and that "cause" is to be determined by a separate agency, the Merit Systems Protection Board as in the Veterans Access Act context.<sup>126</sup> Nor do the agencies set pay for ALJs, and agencies cannot dock ALJs' pay.<sup>127</sup> Agencies cannot subject ALJs to performance evaluations, for similar reasons.<sup>128</sup> In addition, ex parte discussions with outsiders are limited in order to prevent even the

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123. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (providing that government employment can be an entitlement subject to Due Process protection).

124. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (delineating balancing test to use to determine if sufficient process is afforded).

125. 5 U.S.C. § 501 (2012); *see also* OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATIONS IN THE FEDERAL SECTOR HEARING PROGRAM 4–8 (Mar. 31, 2014), *available at* <https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf> (providing on overview of the APA's requirements for adjudication).

126. 5 U.S.C. § 7521 (2012).

127. 5 U.S.C. § 5372 (2012). Although Congress can reduce pay for ALJs as a group or eliminate their jobs altogether, Congress cannot readily pressure any individual ALJ to reach a particular decision. The issues raised in such hearings, in any event, are unlikely to be of such salience as to attract the attention of members of Congress.

128. 5 U.S.C. § 4301 (2012).

appearance of impropriety.<sup>129</sup> As the Supreme Court described in *Butz v. Economou*,<sup>130</sup>

[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because . . . they were often subordinate to executive officials within the agency.<sup>131</sup>

With respect to ALJ decisions under the APA, agency heads need not pay any deference to the factfinding and legal pronouncements of ALJs. In fact, the only check on agency displacement of ALJ factfinding is that the ALJ's factfinding remains in the record subject to judicial review.<sup>132</sup> With respect to managerial controls, the APA is silent, but Congress provided that agencies may discipline ALJs for "good cause established and determined by the Merit Systems Protection Board" after a formal hearing.<sup>133</sup> Discipline can stem from conduct in the hallways of the agencies,<sup>134</sup> at home,<sup>135</sup> or from general insubordination.<sup>136</sup> Although the APA protections are far from complete, the Court's construction of the appointment and removal authorities provides reason to protect any legislative specification of independence. Congressional measures to shield adjudicative authority from executive branch meddling should be interpreted broadly where possible without fear of stepping on executive toes.

There currently is debate over whether ALJs under the APA should be considered employees, as resolved in *Landry*, or rather inferior

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129. 5 U.S.C. § 554(d) (2012); 5 U.S.C. § 557(d)(1) (2012); *see also* *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993) (applying APA ban to other executive branch officials).

130. 438 U.S. 478 (1978).

131. *Id.* at 513–14. For a discussion of what is meant by decisional independence, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 434–36 (2007).

132. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (explaining that Congress has allowed reviewing courts to set aside findings of fact when there is insufficient evidence).

133. 5 U.S.C. § 7521 (2012).

134. *E.g.*, *SSA v. Carter*, 35 M.S.P.R. 466, 469 (1985) (sexual harassment).

135. *E.g.*, *Long v. SSA*, 635 F.3d 526, 537 (Fed. Cir. 2011) (alleged domestic abuse).

136. *E.g.*, *Abrams v. SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012) (failure to follow case processing order); *SSA v. Manion*, 19 M.S.P.R. 298, 299 (1984) (refusal to hear cases).

officers subject to the Appointments Clause. And, the status of ALJs might turn on whether, by law, their decisions can fashion policy along the typical common law path as opposed to just resolving whatever factual issues are at stake. Congress has greater ability to insulate employees as opposed to inferior officers from managerial oversight given that they are not exercising significant influence over the execution of the laws. Irrespective of the resolution of the open issue, congressional direction that ALJs be independent does not violate the President's Article II authority.

Few court cases have arisen demarcating the line between the quasi-independence guaranteed by Congress and the agency's managerial efforts, but the importance of the line drawing can be seen in ALJs' conflicts with the executive branch's managerial initiatives, particularly at the Social Security Administration (SSA). Several examples illustrate the tension.

First, in response to evidence that ALJs were handling vastly different workloads, the Social Security Administration instituted a variety of reforms in the 1970s, including prohibiting ALJs from writing their own opinions. SSA attempted to attain greater consistency among ALJs hearing disability disputes. Some ALJs decided as many as 120 cases per month while others decided as few as ten.<sup>137</sup> Setting a goal to resolve a certain number of cases per month does, in a sense, interfere with decisionmaking independence. ALJs cannot spend the time they deem appropriate on any given case. Indeed, in *SSA v. Goodman*,<sup>138</sup> the Merit Systems Protection Board blocked an SSA effort to remove an ALJ whose productivity, measured by the number of cases tried, lagged behind the national median.<sup>139</sup> Although the SSA had for years encouraged and then warned the ALJ to increase productivity, the MSPB was unmoved.<sup>140</sup>

In contrast, in *Nash v. Bowen*,<sup>141</sup> an ALJ challenged a production goal as antithetical to the ideal of decisionmaking independence.<sup>142</sup> The court of appeals, however, rejected the claim, reasoning that a production goal "is not a prescription of how . . . an ALJ should decide

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137. JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* 120–21 (1991).

138. 19 M.S.P.R. 321 (1984).

139. *Id.* at 330–31.

140. I have explored this tension before. Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 35–38 (2005).

141. 869 F.2d 675 (1989).

142. *Id.* at 676.

a particular case.”<sup>143</sup> Assuredly, an ALJ might argue that a directive to decide more cases bleeds into the merits. For example, SSA ALJs might spend less time writing decisions when granting claims against the government because the agency has no right to appeal such grants, and thus decisions granting benefits will not be scrutinized as much as those denying benefits. In order to meet a production goal, therefore, the ALJ might be tempted to favor claimants in a close case.<sup>144</sup> But in the absence of any such connection between the number of cases decided and the merits of the case, a production goal does not seem problematic.

The tension has escalated in recent years as SSA has increased the target number of cases that ALJs are to resolve each year to close to six hundred. ALJs may feel beleaguered, and they do,<sup>145</sup> but the question remains whether Congress, in applying the APA to the ALJs, would have wished ALJs to be free from such monitoring. Presumably not. The connection between workload and decisional independence is tenuous,<sup>146</sup> and federal courts have workload goals of their own.<sup>147</sup>

Had SSA announced, instead, a measure to decrease the national grant rate for disability claims, that measure would violate Congress’s specification in the APA that ALJs be independent. A historical example brings home the point. In response to Congress’s concern over proliferation of Social Security disability claims in the late 1970s, SSA announced in 1980 that its Appeals Council would review the decisions of ALJs whose allowance rates of claims were significantly higher than a national random sample, but not those that were lower. In addition, the Council stated that it would focus on cases arising from hearing offices that had high collective approval rates. The agency provided two reasons for targeting ALJs whose allowance rates exceeded the national median as opposed to those with allowance rates below the median. First, given that claimants, not the agency, appeal adverse determinations by the ALJs, review by the Appeals Council would restore some balance to the process, ensuring that the agency did not

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143. *Id.* at 680–81.

144. See HAROLD J. KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS, ACUS REPORT 31 (2013), *available at* [https://www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Consistency\\_Final\\_Report\\_4-3-2013\\_clean.pdf](https://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf) (noting that ALJs under pressure “may have allowed more cases because allowances are easier to process than denials”).

145. *Id.* at 33 (discussing the effects of agency pressure on ALJs).

146. See, e.g., *Association of Administrative Law Judges v. Colvin*, No. 14-1953 (7th Cir. Jan. 23, 2015) (brushing aside ALJ argument that workload undermined independence).

147. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 (1970) (addressing informal federal circuit measures addressing judges’ backlog of cases).

ultimately have to pay more in benefits than Congress had intended. Second, the Appeals Council had previously determined that it agreed more with ALJs whose allowance rates fell beneath the national median than those whose rates exceeded the median. As a result of the own motion review, ALJs were put on notice that they would likely be subject to review if their allowance rates exceeded the national median. Indeed, an SSA memorandum warned that other steps would be taken if ALJ allowance rates continued to be much higher than the national median.

Targeting particular ALJs for review unquestionably can compromise decisional independence, and the SSA program likely was enacted to that end. Directing all ALJs to adhere closer to the national allowance rate resembles a curve familiar in most law school examinations. If Congress had determined that each ALJ was to allow a certain percentage of claims—not an inconceivable notion<sup>148</sup>—then SSA’s own motion review of wayward ALJs would be entirely consistent with the congressional design. SSA oversight would ensure that ALJs not deviate from a curve, much like law administrators attempt to rein in faculty. Congress, however, directed each claim to be assessed on its merits. The idea of a curve originated with the agency, not Congress. The agency’s targeting of ALJs with high allowance rates<sup>149</sup> cannot readily be seen as an effort to promote uniform standards and therefore violated the independence Congress prescribed in the APA.<sup>150</sup>

Nonetheless, SSA can target ALJs based on other factors without violating the independence sought by Congress. It can target judges who are outliers in the sense of both granting greater and fewer claims than the median judge, and it can suggest, without mandating, percentage ranges of grants for particular types of disability claims based on national or regional averages.<sup>151</sup> There also is nothing in the APA preventing agencies from disciplining judges who are behind on their dockets. At a minimum, the APA directs that agency management efforts cannot interfere directly with ALJs’ ability to reach whatever outcome they deem appropriate.

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148. Richard J. Pierce Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 512 (1990).

149. *See Ass’n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (declaring that “unremitting focus on allowance rates” violated the purpose of the APA).

150. *See Harrison v. Coffman*, 35 F. Supp. 2d 722, 726 (E.D. Ark. 1999) (refusing to dismiss first amendment claim by ALJ who alleged dismissal based on impartial decision making).

151. *See KRENT & MORRIS*, *supra* note 144, at 63–69 (proposing reforms to the current framework).

Whether the agency can discipline ALJs for misapplying the law after the fact is less clear. On the one hand, the executive branch's interest in removing an ALJ who applies the law incorrectly or, worse yet, misstates agency policy is clear. Similarly, an agency likely would wish to remove an ALJ who used intemperate language in a decision. To many, the APA's provisions protecting ALJs from removal except for "cause" with the "cause" subject to review by the MSPB should serve as sufficient protection for ALJs. And as mentioned previously, the MSPB has disagreed with employer agencies as to the legality of discipline in many decisions.<sup>152</sup> On the other hand, upholding discipline for the contents of a decision allows an agency to pressure ALJs to reach particular results. The prospect of discipline might pressure ALJs into changing their decisions and thereby undermine the decisional independence that Congress intended through the APA.

Consider the MSPB decision in *SSA v. Anyel*.<sup>153</sup> There, an ALJ challenged agency discipline resulting from errors in decisionmaking. The MSPB Administrative Law Judge (currently, an administrative judge would preside over the case) assigned to hear the challenge ruled that permitting discipline for inaccuracies in an opinion would chill decisional independence.<sup>154</sup> The MSPB reversed, reasoning that the APA was "intended to 'result in a greater assurance of justice at the hands of administrative agencies,'" and that aim eclipsed the subordinate goal of ensuring decisional independence.<sup>155</sup> According to the agency, ridding the agency of ALJs who commit errors is more important than assuring the public of ALJ independence.

The goal of assuring public integrity, however noble, allows too much rein to agency heads. There is no objective metric with which to capture an "error," whether flowing from statutory construction, weighing competing facts, or simply sloppiness. The MSPB decision in *Anyel* skips over the questions of what constitutes an error and what magnitude of error compromises the integrity of the judicial process. After all, ALJs<sup>156</sup> and district court judges<sup>157</sup> are reversed at a substantial clip. The APA's decision not to permit performance ratings

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152. See, e.g., *SSA v. Goodman*, 19 M.S.P.R. 321, 330–31 (1984) (finding insufficient evidence to support the agency's decision).

153. 58 M.S.P.R. 261 (1993).

154. *Id.* at 267.

155. *Id.* at 268 (quoting statement of Sen. Ferguson, APA Legislative History at 337).

156. The remand rate for SSA ALJs, for instance, is close to 50 percent. KRENT & MORRIS, *supra* note 144, at 9.

157. See, e.g., Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit during 2008*, 43 LOY. L.A. L. REV. 51, 67–72 tbl.A (2009) (providing reversal rate for each district court judge within the



strongly suggests that no discipline should be meted out even for what the agency believes to be repeated errors in decisions.<sup>158</sup> Review by the agency is available, and the agency can target ALJs for greater review as long as that review is fashioned in a way that does not lean to a particular result. Any discipline must be exogenous to the ALJ's reasoning in the decision itself.

Management discipline of immigration judges highlights the danger of meddling.<sup>159</sup> During the prior administration, the Attorney General delegated to the Director of the Executive Office of Immigration Review ("EOIR") the power to

[d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket.<sup>160</sup>

Indeed, in one case, a superior within the DOJ called the Chief Immigration Judge and convinced him to direct an immigration judge handling a controversial case to change his decision.<sup>161</sup> Moreover, Attorney General Ashcroft in 2002 proclaimed that each member of the Board of Immigration Appeals, the next level of review, "is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General . . . as necessary to fulfill the Department's mission."<sup>162</sup> Judges who disagreed with the Attorney General's views on the propriety of asylum could be reassigned within the Department.

Congress's provision of decisional independence under the APA—unlike in the immigration context—should be understood as a directive to preclude not only interference in pending cases, but also discipline arising from the substance of decisions, however poorly reasoned. This

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Eighth Circuit, many who had significant reversal rates, though much less than for SSA ALJs).

158. For a recent congressional report castigating ALJ errors in decision making, see MISPLACED PRIORITIES: HOW THE SOCIAL SECURITY ADMINISTRATION SACRIFICED QUALITY FOR QUANTITY IN THE DISABILITY DETERMINATION PROCESS, H.R. STAFF REPORT, COMM. ON OVERSIGHT AND GOVERNMENT REFORM 13–31 (2014).

159. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371–79 (2006) (discussing the increasing lessening of "decisional independence" in immigration proceedings).

160. 8 C.F.R. § 1003.0(b)(1)(ii) (2014).

161. Legomsky, *supra* note 159, at 373.

162. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002).

conclusion may seem counterintuitive, forcing agencies to retain ALJs who misstate agency policy or who fail to analyze cases carefully. The directive for decisional independence nonetheless places a buffer of protection around ALJs at least with respect to the analysis in their decisions. In establishing decisional independence, Congress presumably would not have anticipated discipline based on good faith efforts to get the decision right.

Indeed, the MSPB on occasions other than in *Anyel* has been more sensitive to preserving decisional independence. In *SSA v. Burris*,<sup>163</sup> the agency disciplined an ALJ who had provided claimants with a copy of warnings he had received from SSA due to his belief that the agency was not affording claimants due process.<sup>164</sup> The MSPB stated that “[t]he ability of an administrative law judge to write decisions free from improper agency pressure is at the very core of an administrative law judge’s decisional independence” and that the managerial orders to the ALJ prohibiting him from sharing information with claimants intruded on his “decisional independence.”<sup>165</sup> The buffer zone created by the APA’s decisional independence is critical to preserving the allocation of power between Congress and the President in superintending adjudicative systems delegated by Congress.

For another example, consider the SSA’s rule providing that “[t]he ALJ must not use the decision as a forum for criticizing other government components, the courts, the representative or the claimant.”<sup>166</sup> There is no question that such a rule seeks to uphold the integrity and respect for the adjudicative process. Although the rule is even handed, if the criticism is fundamental to explaining the decision, the SSA rule may blunt the independence envisioned by Congress. The issue arose in an arbitration questioning the legitimacy of discipline of an SSA ALJ for commenting in decisions that he had been instructed to make decisions after 900 days based on whatever was in the record, no matter if incomplete. If the 900-day policy indeed were in place, which was contested, then inclusion of that information in the decision to explain why other possibly relevant information was not included in the record would have been appropriate, despite the agency rule forbidding criticism.<sup>167</sup> In a close case, courts and the MSPB should

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163. 39 M.S.P.R. 51 (1988).

164. *Id.* at 60–61.

165. *Id.* at 61; *see also* *SSA v. Glover*, 23 M.S.P.R. 57, 77 (1984) (declining to discipline ALJ for comment in decision critiquing SSA’s ability to generate an adequate record).

166. SOCIAL SECURITY ADMINISTRATION, HEARING, ADMINISTRATION, AND LITIGATION LAW MANUAL I-2-8-25 (2005), *available at* [http://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-8-25.html](http://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-25.html).

167. *In re SSA and Ass’n of Admin. Law Judges*, 4, 5 (2011) (determining that decision to discipline ALJ Steven H. Templin was proper and not in violation of collective bargaining agreement between ALJs and SSA).

uphold the congressionally directed decisional independence at the expense of the managerial directives when the contents of the decisions are implicated.

To be sure, agency managers would not want to give ALJs free rein to air grievances in decisions, but the MSPB or arbitrator must determine if the material in the decision is germane to the claim for disability. Agencies can still proceed against ALJs under a theory of insubordination if criticism in the decision is gratuitous and, of course, if the ALJ's anger is manifested in other ways, discipline would be appropriate.

This is not to suggest that the APA captures the balance between decisional independence and the executive's need to manage judging optimally. One simple change would be for Congress to prescribe five- or ten-year terms in office for ALJs and provide that such terms be presumptively renewable. If an agency is convinced that an ALJ has erred consistently, it need not reappoint him or her to another term. Currently, even without any revision, ALJs who err should not be immune from retraining.<sup>168</sup> Agencies in extreme cases can withhold new cases from the ALJs.

If the APA does not apply, the executive branch can and has exerted closer control. In such contexts, the Due Process Clause stands as a critical check, but not all adjudicative schemes, such as the asylum claims, include an entitlement.<sup>169</sup> In contrast to ALJs, the executive branch can provide for performance appraisals and assess the quality of non-APA officials' judging.

Finally, the salience of the APA's provision for decisional independence provides justification for the otherwise questionable statutory construction analysis in *Portland Audubon Society v. Endangered Species Committee*.<sup>170</sup> There, the Ninth Circuit considered whether the APA provision forbidding ex parte contacts between an ALJ and "a person or party on a fact in issue"<sup>171</sup> applied to the President and White House staff. The President argued that interpreting the APA to include White House staff within "person or party" would undermine his ability to control subordinates under Article II.<sup>172</sup> Given that the Supreme Court the year before held that the President could not be considered

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168. *Cf. Stephens v. MSPB*, 986 F.2d 493, 495–98 (Fed. Cir. 1993) (dismissing an ALJ's appeal of a decision to require him to attend additional training).

169. 8 C.F.R. § 1003.0(b)(1)(v) (2014). This is not to suggest that Attorney Generals have exercised this managerial authority wisely. *See, e.g.,* Legomsky, *supra* note 159, at 371–79 (criticizing the Attorney General's managerial efforts in an asylum adjudication context).

170. 984 F.2d 1534 (9th Cir. 1993).

171. 5 U.S.C. § 554(d) (2012).

172. *Portland Audubon*, 584 F.2d at 1546.

an agency subject to the APA,<sup>173</sup> the executive branch's statutory construction argument was plausible. Nonetheless, permitting ex parte contacts with White House staff unquestionably would blunt Congress's intent in the APA to preserve decisional independence. The Ninth Circuit's decision, therefore, can be seen to implement the APA's goal of decisional independence.<sup>174</sup>

## CONCLUSION

In short, Congress has the power to limit the executive branch's managerial authority over judicial officials more than they do over those officials engaged in enforcement and regulation. Congressional efforts to direct the process by which claims are to be adjudicated, as in the recent Veterans Administration example, eclipse the Article II interest in managing the executive branch. Moreover, Congress's principal effort to shape adjudication in the executive branch—the APA—provides for a limited decisional independence for ALJs, which must at a minimum protect an ALJ's ability to find facts without pressure from above. Congress's specification of decisional independence should be construed to insulate ALJs from discipline for their analysis of the rules and facts at issue.

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173. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

174. See Vermeule, *supra* note 93, at 1222–23 (defending the ruling on grounds of “convention” as opposed to the intent expressed by Congress overall in the APA).